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No. 89-1895

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION,

Petitioner,

vs.

ANGELO J. SOLIMINO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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INTRODUCTION

Respondent herein respectfully submits his Brief in Opposition to the Petition for a Writ of Certiorari.

ARGUMENT

I.

THE ASSERTED CONFLICT IN CIRCUIT COURT DECISIONS HAS BEEN SUBSTANTIALLY ELIMINATED

Although the Petitioner's Brief contains extensive reargument of the merits of the Second Circuit's decision herein, the only proper question currently before this Court is whether there is a good reason for this Court to assume jurisdiction to hear Petitioner's appeal of said decision. Obviously, not every conflict in the Circuits warrants corrective action by this Court. Here, the particular conflict described is quite unlikely to continue in the future because the sheer weight of authority on

this issue has clearly been determined. Thus, although there exists a facial conflict between the Eighth Circuit's decision in Stillians, on the one hand, and the Seventh and Second Circuit decisions in Duggan and Solimimo, on the other, that conflict is not likely to have any continuing legal significance for other federal courts. A brief perusal of the three (3) decisions will show that the reasoning strength of the Second and Seventh Circuit decisions far outweighs that of the Eighth Circuit (which itself was a 2 to 1 decision). As is evident from a perusal of the three (3) decisions, the Stillians decision is somewhat cursory, reflects inadequate research on statutory exegesis, and fails to address the substantial pieces of evidence in the ADEA itself that Congress never intended to mandate state agency

preclusion. On the other hand, the Duggan and Solimimo decisions are so carefully and thoroughly reasoned that it is doubtful that any other district court in the future would be likely to follow the Stillians approach.

II.

THE COURT SHOULD NOT HAVE TO INTERPRET ITS OWN DECISION IN ELLIOTT BECAUSE THAT DECISION IS CLEAR AND CONTROLLING

Respondent submits that the Second Circuit decision herein has served to resolve the conflict argument being made by Petitioner, in that the Second Circuit has carefully examined and compared Stillians with Duggan and has clearly demonstrated the flawed reasoning in Stillians, along with many other factors and considerations, that definitively militate against agency preclusion under ADEA.

The issue is further simplified by the fact that this Court has already carefully fixed, in the Elliott case, which is unquestionably controlling, the parameters for the type of analysis to be undertaken in resolving the type of issue raised at bar. There can be no doubt that the analysis used in that decision for Title VII cases can and should be applied to the ADEA. Thus, there is no reason for this Court to repeat what it has already said in Elliott.

Nor would it make any sense for this Court, having itself already set forth in Elliott the guidelines for the lower courts to follow in deciding agency preclusions issues, to find itself having to repeat what it said by taking the lower courts by the hand to show them just how to apply that analysis. A different result might be reached if

Elliott were controversial; but Elliott itself has not stirred any debate. Nor is there any claim by either side that Elliott is wrongly decided or unclear. Yet, if this Court agrees to take jurisdiction of this case, it will necessarily mean that the Elliott guidelines were somehow not clear or appropriate when promulgated -- a result contrary to the facts. For this reason, this Court should decline to issue yet another decision explaining Elliott and revisiting the agency preclusion issue when Elliott itself, the governing law on this point, is sufficiently clear.

CONCLUSION

For the foregoing reasons, the Court should deny issuance of a writ of certiorari with respect to the judgment and opinion of the Second Circuit herein.

Dated: July 23, 1990

Respectfully
Submittted,

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